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No. 98-518

FILED  
FEB 17 1998

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998

FLORENCE DOLAN,

*Petitioner,*

v.

CITY OF TIGARD,

*Respondent.*

On Writ of Certiorari to the  
Oregon Supreme Court

**BRIEF OF THE STATE OF NEW JERSEY AS AMICUS  
CURIAE IN SUPPORT OF THE RESPONDENT**

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PRINTED BY BYRON E. ADAMS, WASHINGTON, D.C. 1-800-347-6288

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Brief of the State of New Jersey as  
Amicus Curiae in Support of the Respondent

**INTEREST OF AMICUS CURIAE**

This case implicates the constitutional latitude of State and local governments and planning authorities to implement comprehensive health and safety, land use planning and environmental programs for the public benefit in a flexible manner. Each of the Amici States currently implements comprehensive plans of this nature to protect the public health and safety and private and public resources. For example, the State of New Jersey implements comprehensive programs in order to manage development in its coastal region, Pine Barrens region, and freshwater wetlands.

These programs depend upon both general planning and the individual development approval processes to discourage development in environmentally sensitive areas, to encourage the preservation of open space, to steer development into areas with adequate infrastructure, and to help ensure public access to important public resources such as the waterfront. Government's need to address such impacts is particularly acute in states such as New Jersey, the country's most densely populated State. The devices used to promote these goals include conservation easements and dedications. Petitioner challenges the uncompensated use of those devices under the Takings Clause of the United States Constitution.

Comprehensive land use and environmental planning is critical to properly manage growth, to protect remaining natural resources, to reduce congestion on already overburdened streets and highways, to increase efficiency in the use and construction of infrastructure and to promote public access to public resources so as to preserve the public health, safety and quality of life. These comprehensive goals can be fairly and effectively achieved if governmental bodies are allowed to implement legislatively devised plans and solutions in a flexible manner. Achievement of these critically important goals will be thwarted, however, if individual development approvals are subject to an overly rigid judicial review process in takings litigation that focuses too extensively on site-specific findings and studies and too little on the recognized, cumulative impacts of development.

The Amici States strongly support the ability of governmental planning authorities to use the individual development approval process to implement comprehensive legislative plans which are rationally based on the documented, cumulative impacts of development. This ability can best be protected if such plans are accorded due deference in judicial review, but will be undermined if governmental authorities are required under the rubric of

takings law to justify with mathematical precision, solely on a site-specific basis, the actions taken on each individual development application.

For these reasons, Amici endorse the use of a test that recognizes the constitutional authority of elected representatives and their appointees to adopt reasonable regulations that protect public and private resources and that balances that authority with the rights of affected property owners. Use of such a test in takings litigation will appropriately recognize the importance of comprehensive, legislative plans and findings, while at the same time affording property owners an opportunity to show that an application of the general rules is not warranted for site-specific reasons.

## STATEMENT OF THE CASE

Petitioner Florence Dolan contests two conditions contained within the City of Tigard's permit allowing her to replace an existing 9,700 square foot commercial retail business located in the downtown area with a 17,600 square foot building and to expand the building's parking lot. The first condition requires Dolan to dedicate that portion of her property lying within the floodplain for a storm drainage system and greenway. The second condition requires Dolan to dedicate an additional 15-foot strip of land adjacent to the floodplain for a pedestrian/bicycle path. The property affected by these dedications constitutes approximately ten percent of Dolan's 1.67 acre parcel.

The required dedications do not compel Dolan to construct the drainage improvements or path, but to allow the public to use those areas for those purposes. The floodplain located on the property is adjacent to Fanno Creek, a waterway whose drainage basin has experienced rapid urbanization over the past 30 years, resulting in a significant increase in stream flows during periods of

precipitation. In addition, the City of Tigard is located in an area which does not meet the federal air quality standards contained in the federal Clean Air Act, 42 U.S.C. §7401 et seq. That Act strongly encourages the use of alternative modes of transportation such as bicycles to meet clean air standards. See, e.g., 42 U.S.C. §7408(f)(1)(A)(vii), (ix), (x) and (xv).

The required dedications will in no way affect Dolan's ability to conduct or expand her existing retail business, but will allow increased public access to it. The dedications confer additional benefits on Dolan by protecting her property from flooding and by relieving her of any obligation to construct or maintain drainage improvements on the floodplain portion of her property or to widen the existing road in front of her building, even though she is effectively doubling the size of her existing retail development.

#### INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner urges this Court to apply an "essential nexus" test to review the dedication conditions contained in her permit and argues that the dedications constitute a taking of her property because the City of Tigard did not meet such a test when it determined that her increased development would increase traffic and stormwater runoff. In petitioner's view, such an "essential nexus" can exist only if the dedications are required to address the impacts of her development alone, and cannot exist if the dedications are reasonably related to the impacts of her development but may also be needed to address the cumulative impacts of similar developments.

If petitioner's proffered standard were adopted, an unconstitutional taking could automatically be found in every instance where a governmental authority required a

dedication as part of a development approval, unless the authority established with mathematical precision the specific impacts of each individual development and correlated those impacts to the required dedication. Because this approach is not required by the Federal Constitution and would significantly undermine comprehensive planning efforts, eliminate important options in the approval process, and avoid the balancing of societal and individual interests that has been the hallmark of takings analysis, it should not be followed. Rather, this Court should adopt an approach that allows governmental authorities to rely on cumulative, legislative findings when imposing exactions and that places on the property owner the burden of showing why those legislative findings are not applicable to his development or why the exactions would pose an undue burden on his overall use of the property, once the government has shown a reasonable nexus between its legislative findings and the exaction.

Publicly elected representatives have long had the recognized authority to impose reasonable conditions on development to protect the public health, safety and welfare and to avoid any adverse impacts which would otherwise result from increased development. Penn. Central Transportation Co. v. New York, 438 U.S. 104, 125-27 (1978). As part of this right, governmental entities often require subdivision developers to install streets, sewers, and other necessary infrastructure on-site and to then dedicate those improvements. These dedications are not ordinarily viewed as takings, but as reasonable exercises of the police power. In addition, the approving authority is not normally compelled to show the existence of a mathematically precise "essential nexus" to justify the dedications, because it is recognized that development itself spawns the need for the improvements. Cf. Pennell v. San Jose, 485 U.S. 1, 20 (1988)(Scalia, J., dissenting)(describing common zoning regulations regarding lot size, set-backs and street dedications as "within our constitutional traditions").



Similarly, federal and state authorities also enact and implement a variety of land use and environmental laws that protect the public health and welfare by restricting inappropriate development on the basis of comprehensive environmental concerns. Such laws are based on legislative findings that indicate that unrestricted development in or around environmentally sensitive areas will have known adverse impacts on a cumulative basis, and that to avoid these impacts, such development should be allowed only if explicit conditions and standards are met. As in the case of on-site infrastructure requirements, these legislatively-set standards and conditions are applied to individual property owners on a routine basis, without the need for the governmental entity to prove each time on a site-specific basis the general findings of environmental impact which caused the legislation to be enacted in the first place. Cf. United States v. Riverside Bayview Homes, 474 U.S. 121, 133-35 (1985) (discussing the general role which wetlands play in protecting overall water quality).

Neither existing constitutional law nor these longstanding and accepted practices support petitioner's position that an approving authority must show a mathematically precise nexus between a proposed development's impacts and an exaction, based solely on site-specific findings, in order to avoid a finding that an exaction contained within a development approval constitutes a taking. Rather, existing law requires that a regulatory land use scheme be substantially related to a legitimate governmental purpose, and that a reasonable nexus exist between a development's impacts and an exaction. Moreover, this case aptly illustrates the unnecessary burden that will be placed on governmental authorities if the takings test urged by petitioner is adopted.

In this matter, petitioner has been asked to dedicate a minor portion of her property located in and near a floodplain for storm drainage improvements and a

pedestrian/bikepath, as part of an approval that allows her to effectively double the commercial development of her property. Petitioner's development application never called for development within the area affected by the dedications. In addition, increased development is generally recognized to cause increased stormwater runoff and traffic, and the adverse effects of development in a floodplain are also well known. Consequently, New Jersey and other States typically impose significant restrictions on development in such an area. See, e.g., N.J.S.A. 58:16A-55.2 (forbidding construction within the 100-year floodplain unless those conditions prescribed "for preserving such area and providing for the flow of water therein to safeguard the public against danger" are met). These facts are appropriately reflected in the City's ordinances, which allow the dedications at issue to be required as a consequence of increased development.

Takings law as established by this Court does not provide that these exactions constitute a per se taking or require the City to show a mathematically precise relationship between the development and the dedications to avoid a taking. Rather, that law provides that for such an exaction to be imposed without constituting a taking, there must be a reasonable nexus between the impacts of the proposed development and the exactions. Nollan v. California Coastal Commission, 483 U.S. 831, 836 (1987). That nexus undoubtedly exists in this case. Thus, the Nollan decision requires affirmance of the Oregon Supreme Court's decision here.

In addition, takings law also provides for the use of a three-part balancing test on an ad hoc basis to evaluate whether specific governmental action takes private property for public use without just compensation by unduly interfering with an affected individual's property rights. Concrete Pipe and Products v. Construction Laborers Pension Trust, 113 S.Ct. 2264 (1993); Connolly v. Pension



Benefit Guaranty Corp., 475 U.S. 211 (1986). Application of that test would not result in a taking here, given the nature and scope of the exactions, the nature and existing use of the property, and the impacts of the exactions on petitioner's ability to conduct and expand her business.

Expanding takings principles to adopt petitioner's suggested approach would be inconsistent with the precedents of this Court and would impose an unwise, unnecessary and unworkable burden on governmental authorities responsible for regulating development on a comprehensive basis. Accordingly, petitioner's suggested standard should be rejected in a case such as this one, where an exaction is imposed as part of a comprehensive regulatory scheme that properly advances a legitimate governmental interest, the exaction reasonably advances that interest and does not unduly interfere with the property owner's plans and expectations, and the property owner has not demonstrated that the regulatory scheme cannot rationally be applied to her proposed development.

## ARGUMENT

### I. A Dedication Requirement Included Within a Development Approval Does Not Constitute a Per Se Taking or Require the Approving Authority to Establish the Need for the Dedication With Mathematical Precision on a Site-Specific Basis to Avoid a Taking.

### A. A Dedication Requirement That is Reasonably Related to the Anticipated Impacts of Proposed Development and Does Not Excessively Interfere With the Property Owner's Reasonable Expectations or Viable Use of Property Does Not Constitute a Taking of Property.

This Court has frequently recognized the government's ability to use the police power to restrict or even preclude harmful development, and has stated that such regulation does not constitute a taking of property if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. Penn Central Transportation Co. v. New York, 438 U.S. 104, 127 (1978). In addition, this Court has also recognized that because the government has the police power to prevent development that will cause adverse impacts without effecting a taking, it also has the power to condition approval of such development upon a concession of property rights that mitigates those impacts without causing a taking. Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987). Thus, this Court has explicitly rejected the notion that when a proposed development can be expected to have adverse effects the only option available to the government is to prohibit the development, and has instead recognized that in such an instance it is entirely permissible to condition development upon an exaction that will reduce the type of harmful effects that would otherwise be expected to flow from the development.

Petitioner acknowledges this precedent, but argues nevertheless that the imposition of an exaction automatically results in a taking unless the government provides explicit, site-specific findings directly relating the impacts of the proposed development to the exaction. Petitioner also suggests that an exaction constitutes a taking unless those

findings establish a nearly perfect fit between the impacts of the individual proposed development and the exaction.

Petitioner's analysis is clearly inconsistent with the government's authority under the police power to impose rational and reasonable conditions restricting development without the need for exact mathematical precision. Moreover, petitioner's approach is also at variance with Nollan and other takings precedents of this Court, because it fails to balance the rights of individual property owners with the governmental police power to protect the general health, safety and welfare.

In Nollan, this Court determined that as an alternative to disallowing development, the government could couple a development approval with an exaction designed to counteract the development's harmful effects. This Court then held that the exaction imposed in that case bore no relationship to the harmful effects of the development identified by the governmental authority, and that the exaction constituted a taking as a result. However, this Court did not hold in Nollan that a substantial relationship between the development's impact and an exaction was required, or that the government was obliged to show this relationship with mathematical precision or to limit its analysis strictly to the impacts of the development in question alone in order to avoid a taking. Cf. Jordan v. Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dismissed 385 U.S. 4 (1966); Collis v. Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976); Call v. West Jordan, 614 P.2d 1257 (Utah 1980); College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (declining to use a strict proportionality test, and cited with approval in Nollan). Nor did this Court hold in Nollan that the burden of showing a relationship between the impacts of the development and the exaction should rest entirely and exclusively on the approving authority. Rather, this Court held that an exaction

that had no relationship to the development's impacts could not be imposed.

In addition, other decisions of this Court make it clear that to determine if a taking has occurred, a three-part test is generally employed, as opposed to the mathematically precise test which petitioner labels an "essential nexus" test. That three-part test examines the character of the governmental action, the economic impact of the governmental regulation, and the extent to which the regulation interferes with the reasonable, investment-backed expectations of the property owner to determine if a taking has occurred. Concrete Pipe and Products v. Construction Laborers Pension Trust, *supra*; Connolly v. Pension Benefit Guaranty Corp., *supra*. Petitioner's suggested approach to takings law ignores this test, which appropriately recognizes and seeks to balance individual and societal interests before determining if a taking has been effected by governmental action. However, abandonment of that test is not required under Nollan or any other decision of this Court and should not occur in an exactions case.

Petitioner's expansion of her existing commercial establishment will effectively double the development on her property. There is an obvious nexus between such an expansion and increased traffic; in fact, petitioner is clearly inviting and anticipating that increase by significantly enlarging her business and parking lot.

Similarly, there is an obvious nexus between a significant increase in the impervious surface of a site and an increase in stormwater runoff. That nexus is commonly recognized by both State and local governments and is

typically reflected in State and local land use regulations.<sup>1</sup> These regulations are adopted because it is well known that an increase in impervious surfaces will result in an increase in the volume and rate of stormwater runoff, which in turn increases erosion and degrades surface and groundwater quality.

Given these legislative facts, the nexus found lacking by this Court in Nollan clearly exists in this case and no taking has occurred on the basis of Nollan.<sup>2</sup> Accordingly, because that nexus exists, the challenged dedications should be examined under the three-part takings test used in Connolly and other cases to balance the societal interest advanced by the City's comprehensive plan against the burdens it imposes on the petitioner.

In addition, a taking has also not occurred here on the basis of the physical invasion standard that is contained in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Accordingly, that standard is likewise not applicable as a substitute for the three-part balancing test. In Loretto, this Court stated that a taking would generally be found where government caused the permanent physical occupation of private property, irrespective of other factors.

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<sup>1</sup>For example, New Jersey's coastal zone management rules require developers to use the best available technology to minimize stormwater runoff and to increase natural filtration, and prohibit development in sites subject to flooding if the development will increase peak run-off after storm events. N.J.A.C. 7:7E-8.7

<sup>2</sup>Petitioner has stated that the New Jersey Supreme Court misapplied the Nollan test in Bernardsville Quarry v. Bernardsville, 129 N.J. 221, 608 A.2d 1377 (1992). This statement is incorrect. Unlike Nollan, Bernardsville did not involve an exaction, but a restriction on property use. Moreover, in Bernardsville the New Jersey Supreme Court appropriately determined that the municipal quarrying ordinances challenged there substantially advanced legitimate state interests.

However, unlike this case, Loretto did not involve an exaction included within a development approval. Moreover, this Court also stated in Loretto that temporary public passage on property did not constitute a permanent physical occupation, and that the extent to which the property owner had exhibited an interest in excluding others should also be considered in the takings analysis. Loretto, 458 U.S. at 436. This Court recently conducted such an analysis in Yee v. Escondido, 112 S. Ct. 1522 (1992), and concluded that a rent control ordinance which restricted the owner's ability to exclude tenants did not effect a taking, based in part on the fact that the owner had voluntarily opened his property to others and could still exclude persons from his property if he converted it to another use. See also Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980)(a State regulation restricting the ability of the owner of a shopping mall to exclude others did not constitute a taking because the right of exclusion was not essential to the use or value of the property in question).

As in Yee and Prune Yard, the dedications required in this case also do not constitute a taking of property requiring abandonment of the three-part test. That test appropriately balances societal and individual interests and focuses on the overall economic impact that a regulatory scheme has on property use as well as on whether the nature of the governmental action is a physical intrusion or a regulatory restriction on property use.

The first factor examined in that test, the character of the governmental action, does not in this instance weigh heavily in the petitioner's favor, even though the dedications require petitioner to allow the public to use a small portion of her property for drainage and a pathway. Petitioner owns commercial property and conducts a retail business in the City's downtown. She invites the public onto her property every day and, unlike a residential owner, has no expectation of excluding the public. Thus, the economic



viability of her property is not dependent on the ability to exclude others, but is on the contrary contingent on the public's ability to gain access to the property. Accordingly, the requirement that petitioner dedicate a minor part of her property for a pedestrian/bikepath and stormwater drainage improvements cannot be said to constitute a taking on the basis of a right to exclude.

On the other hand, the two remaining parts of the three-part takings test weigh heavily against petitioner. The dedications will in no way reduce the economic viability of petitioner's use of her property, but may in fact enhance it by allowing more members of the public to reach the property and by making the property and downtown area as a whole more attractive to the public. This positive overall economic impact clearly reduces the merit of any claim that petitioner's property has been taken. *Cf. Bauman v. Ross*, 167 U.S. 548, 574-75 (1897) (stating that if a taking of a part of an individual's property increases the value of the remainder, that increase must be considered when setting compensation).

In addition, the dedications will also not cause any interference with petitioner's reasonable, investment-backed expectations. The dedications will in no way prevent petitioner from expanding or conducting her business, or affect its profitability in any way. Instead, the dedications may potentially increase that profitability, by protecting the property from flooding, relieving petitioner of any obligation to install or maintain drainage improvements, and allowing more members of the public to become aware of the business.

Based on these circumstances, the City is not taking petitioner's property by requiring the dedications, regardless of whether the dedications are necessitated solely by petitioner's development. The dedications affect a minor portion of the property and are similar to required

infrastructure dedications for sidewalks, streets, sewers and the like, which have traditionally been used to offset the undisputed impacts of development. Moreover, the dedications bear an obvious nexus to petitioner's development, and there is no constitutional requirement that this nexus be established with absolute mathematical precision. Finally, the dedications will in no way detrimentally affect petitioner's ability to use her property and will in no way detrimentally affect the profitability of petitioner's business. Instead, the dedications are likely to increase that profitability. Accordingly, the dedications do not take petitioner's property.

**B. The Nexus Test Urged by Petitioner Should Not Be Adopted, Because It Does Not Recognize the Important Public Interest in Legislative, Comprehensive Planning to Protect Public Health and Safety.**

In urging this Court to conclude that her property has been taken by virtue of the dedication requirements, petitioner argues that there is no precise nexus between the dedications and the impacts of her development, and that the City must show such a nexus to avoid a taking. However, this Court has never adopted this type of takings analysis, and if the three-part takings analysis that is ordinarily used were applied to this case, no taking would result. Moreover, this Court should reject petitioner's proffered takings test, because use of the test will seriously and unnecessarily undermine the ability of governmental authorities to implement comprehensive planning and environmental regulations.

The benefits of comprehensive land use planning and the detriments associated with a failure to plan are well known and have been recognized by this Court for many years. *Agins v. Tiburon*, 447 U.S. 255, 261-62 (1980); *Penn*

Central Transportation Co. v. New York, 438 U.S. 104, 129-30 (1978); Euclid v. Ambler Realty, 272 U.S. 365 (1926). Based on those benefits and on the fact that land use plans are normally the result of the legislative process, this Court and other courts have declined to subject such plans to mathematically precise review, and have instead only required that the plans be reasonably related to the achievement of a legitimate governmental interest. Euclid, 272 U.S. at 395. See also Jordan v. Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dismissed 385 U.S. 4 (1966); Collis v. Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976); Call v. West Jordan, 614 P.2d 1257 (Utah 1980); College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (declining to use a strict proportionality test, and cited with approval in Nollan). Similarly, this Court has also never required an exact fit under takings law between the benefits received from regulation and the burdens imposed. Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987). This approach rightfully allows comprehensive planning decisions to be made as part of the legislative process, and allows the plans to be implemented after adoption without a requirement for the implementing authority to justify the plans on a site-specific basis. Indeed, a requirement for this kind of justification would be inimical to the goal of comprehensive planning, which addresses the impacts of development in a cumulative fashion so as to avoid the well known problems associated with development that is haphazard and piecemeal.

Similarly, a wide variety of federal, state and local environmental laws also rely on the comprehensive planning process to prevent cumulative environmental degradation and to protect environmental resources. This reliance occurs, for example, in the Coastal Zone Management Act, 16 U.S.C. §1451 *et seq.*, the Clean Water Act, 33 U.S.C. §1251 *et seq.*, and the Clean Air Act, 42 U.S.C. §7401 *et seq.*, all of which provide for state or local governments to adopt

comprehensive plans to protect natural resources and to improve environmental quality. These planning requirements stem from a realization that environmental problems can only be solved on a cumulative basis and that the environmental impacts of development and land use are best assessed on a cumulative basis. They reflect the fact that while the impacts associated with any individual development may be small or difficult to evaluate, information on the impacts of development as a whole is much more readily available and understood.

Petitioner's suggested approach to takings law completely ignores these facts and would require governmental authorities to make specific findings regarding a development's impacts even if general legislative findings linking the cumulative impacts of similar developments to any required exactions had already been made. However, this Court has in the past declined to require such findings, in deference to the legislative process. See, e.g., FW/PBS, Inc. v. Dallas, 110 S. Ct. 596, 610 (1990). Moreover, petitioner's approach is completely contrary to the presumption of validity that is generally accorded to legislation. Accordingly, that approach should be rejected and the *ad hoc* balancing test should be used instead, so long as there is a reasonable nexus between the development's impacts and the exaction. Use of that process will allow the government to rely on cumulative, legislative findings to support an exaction and will thus appropriately incorporate comprehensive legislative plans and recognize the critical importance of such planning.

### **C. Petitioner's Suggested Test Inappropriately Shifts the Entire Burden of Proof in a Takings Case to the Government.**

Once a comprehensive plan is adopted through the public, legislative process, individual property owners are generally required to conform to it unless they can show

through a variance procedure that their proposed development will for some reason not have the impacts generally associated with the type of development they propose. Accordingly, the burden of proof to obtain a variance is typically placed on the developer, who must show why his development meets the requirements of the general scheme, or if it does not, why he should be excused from compliance with that scheme. Petitioner was afforded the opportunity to make such a showing in this case, but chose instead to assert that the burden was on the City.

Petitioner's proffered approach would turn traditional land use procedures on their head and place an undue and unnecessary burden on planning authorities to prove site by site the theories which were used to develop the plan in the first place. However, such an approach is not required by takings law, which ordinarily places the burden of showing a taking on the property owner. See, e.g., In re Egg Harbor Associates, 94 N.J. 358, 374, 464 A.2d 1115, 1123 (1983). In addition, after governmental authorities have enacted a comprehensive regulatory scheme through the public legislative process, they should not have the burden of justifying that scheme over and over and site by site.

Moreover, it is extremely impractical to require that government establish the specific impacts of each development, particularly when those impacts involve complex ecological systems requiring extensive study. If petitioner's approach were adopted, governmental authorities could in many instances be put to an extremely costly and time-consuming task and would be unable to timely implement cumulative plans at specific sites. Thus, petitioner's approach would result in protracted litigation, an inability to implement the comprehensive plan as a whole, and in the haphazard and piecemeal development that the plan sought to avoid in the first place.

For these reasons, this Court should not accept petitioner's invitation to expand takings law by placing on governmental authorities the burden of justifying conditions placed in development approvals with precision on a site-specific basis. Instead, this Court should continue to allow authorities to use general legislative facts as justification and should, once the government has shown a reasonable nexus between those facts and the exaction, shift the burden of proof to the property owner to show that the nexus is not applicable to his development.

Such an approach will allow government to continue to address land use and environmental problems on a realistic cumulative basis and will afford due deference to legislatively crafted solutions to comprehensive problems. It will also continue to give individual property owners the ability to obtain relief through a variance procedure if they can show that the development they propose will not have the impacts generally associated with similar developments and if application of the comprehensive plan will have an unfairly onerous impact on their property as a whole and on their reasonable expectations.

For these reasons, the dedications included in Dolan's development approval do not violate the Takings Clause of the United States Constitution, as they are justified to advance rational legislation which protects the public health and safety and to abate the burdens caused by petitioner's development and similar developments.



## CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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Dated: February 15, 1994